seems to us an error which perhaps may be traced to a sentence in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, to the effect that manufacture precedes commerce. This is of course true. But it is an obvious non-sequitur to say that therefore Congress cannot exert its power over commerce merely because such exercise would through commerce indirectly affect manufacture. Certainly the commerce power was not given to Congress for the sole purpose of regulating and promoting commerce as an end in and of itself. There is abundant evidence that it was given not only to prevent the abuses of which some of the states had been guilty in dealing with commerce under the Articles of Confederation and of promoting commerce as a means of promotion of the general welfare, but also for the purpose of securing that general welfare by any regulation of commerce productive of such effect and not forbidden by other clauses in the constitution. What possible difference can it make whether the evil aimed at may have been caused before the particular act of transportation has taken place or after it? If the privilege of such interstate transportation and commerce be greatly enlarged the market for the goods transported thus increases the scale of manufacture and the evil which such manufacture produces. That evil in this case includes of course the injury to the child's health, moral and spiritual welfare, and the cutting off of its opportunity for a reasonable amount of education.

The dissenting opinion makes it clear that the real and substantial infraction of the powers of the state governments is caused by denying to Congress the power to regulate this matter and thus putting it within the power of the several states to ship their goods into other states, not only without the consent of the latter but contrary to their established public policy in regard to child labor or whatever else may be involved. Of course the states did not have such extraterritorial power before the adoption of the constitution, and it is absurd to suppose that it was intended to be given to them by that instrument. In the argument of the present case, the government showed very clearly that one effect of the existence of legislation forbidding child labor in some states and the non-existence of such legislation in others is to drive the greedy and conscienceless manufacturers from the states with this enlightened legislation to those which have it not. Not only that, but the goods made in the latter class of states must now be received and may be sold in the other states and to consumers who may have conscientious scruples against the use of such goods and who have no means of knowing whether in fact child labor has been employed in the manufacture.

The scientific and popular opinion is so strong for the prohibition of child labor in this country that it is certain to be obtained sooner or later. It would seem clear that this object may be obtained by an exercise of the taxing power of Congress under the doctrine laid down in *McCray* v. *U. S.*, 195 U. S. 27.

H. M. B.

THE STATUTE OF USES AND ACTIVE TRUSTS.—To explain the survival of uses, *alias* trusts, after the Statute of Uses, one is probably justified in assuming a sympathetic attitude toward this Equitable institution on the part

of the Common Law Judges. Maitland, Equity, 29. But, however predisposed the Judges might be, they would have to satisfy themselves, perhaps others as well, that they were interpreting rather than nullifying the Statute. Only such uses could be saved as could be "distinguished." The case of the use raised upon a chattel interest is clear enough, as it was without the letter, and fairly without the mischief, of the Statute. The case of the use upon a use, while obscure at an earlier day, was elucidated by Mr. Ames, who found the key to the riddle in the fact that, at the time of the enactment and for a century thereafter, there was no such thing as a use upon a use, the declaration of a second use being void for repugnancy, in Equity as well as at Law. Lectures on Legal History, 243. The case of the active use, however, seems to the writer to need further explanation than it has yet received.

The reason usually assigned today for the saving of active trusts is that this is necessary in order to carry out the purpose of the trust—that otherwise the intent of the creator of the trust would be defeated. Since intention was allowed to go by the board in the case of the passive use, this argument involves an implied term: that the reprehensible intent in the one case, to avoid feudal burdens *et cetera,* the very mischief recited in the Statute, merited no consideration: while the legitimate intent in the other case, to provide superior management *et cetera,* did merit consideration, even though the abuses of uses were inseparable from it. At a later period, when the interests which the Statute was designed to protect (viz., the King's feudal revenues; Maitland, Equity, 34, 35) had disappeared, and when, on the other hand, concern for the intention of donors had increased, this might well pass as the rationale of the established doctrine of active uses. But, as an explanation of the origin of that doctrine, it is open to the objection that the judges of Henry's time, who were never much concerned with intention, could hardly have brought themselves to consciously place the purposes of trustors above the interests the invasion of which was so vehemently denounced in the Statute. It is notable that the older authorities on the active use give no hint of this purpose theory.

Mr. Ames said, in a passing remark, that the "special or active trust—was always distinct from a use, and therefore neither executed as such by the Statute of Uses nor forgeitable by Stat. 33 Henry VIII." Lectures on Legal History, 245. Of his three authorities, Bacon fairly supports his position; Sanders merely quotes Bacon, while in another passage not cited by Mr. Ames (Sanders, Uses, 5th ed. 253) he puts forward the purpose theory; and the passage from Chudleigh's case is very obscure. Mr. Ames is, however, supported by the well known Note in Brooke's Abridgement, apparently our oldest authority on the doctrine of the active trust, "Otherwise if he says that the feoffees shall take the profits and deliver them to J. N., this does not make a use in J. N., for he never has them unless by the hands of the feoffees. Bro. Ab. Feoff, al Uses, 52; I Gray's Cases, 410. Mr. Ames must not be understood as asserting a mere distinction in nomenclature, for the terms "use" and "trust", together with "confidence", were always used more or less interchangeably until after the Statute, and, if a distinction in

terms had been clearly recognized, it would have operated to bring the active trust within the Statute by virtue of specification, since the Statute consistently uses the phrase, "use, confidence or trust". The distinction, then, must be between the passive use, confidence or trust, later specified as "use", and the active use, confidence or trust, later specified as "trust", or "special trust", and the distinction must be more fundamental than that which exists in the professional mind today, between the passive and the active trust.

The Note of Brooke's, supra, is susceptible of this interpretation: that, in the case he puts, J. N. had no enforcible right, either at law or in equity. If this were true, the case of the special trust would stand on the same footing as the use upon a use. The writer has been unable to find any authority, except that of unendorsed petitions, to indicate that the Chancellor did enforce this sort of confidence prior to the Statute. But, on the other hand, he finds no authority that he did not, and it seems unlikely that he would have hesitated at this case in view of the fact that he was already dealing with accounting of fiduciaries. I Ames Cases on Equity, 446, n. 1.

It is submitted, with diffidence, that the solution of this puzzle must run something like this. At the time of the Statute, English land was so largely held to uses, (passive uses, of course) that property in land was thought of as a duality—seisin and use. Even when the equitable relation of feoffee and cestui did not obtain, when the legal estate was unencumbered by an outstanding use, the idea of duality remained and the tenant was said to be seised to his own use, the use being characterized as "conjoined" to the seisin. When the use was "divided" from the seisin, the cestui usually had possession, that tangible element of property which at that day, even more than now, approximated ownership. Holmes, Early Equity, II Sel. Essays, 712. Whether the Chancellor would protect the cestui's possession by enjoining interference by the feoffee does not appear, but he would protect it by requiring the feoffee to transfer the seisin to cestui. Contemporary theoretical discussion of the nature of the use we have not, but how can we doubt that the passive use, the common use, was regarded as property—the better part of property? On the other hand, the uncommon active, or special, confidence would almost of necessity be thought of as distinct. In the one case, there was possession; in the other, a mere right to an accounting. On one side, is the common use, an indispensable element of ownership, whether conjoined with the seisin or divided from it; on the other, the special trust, neither an indispensable nor a common feature of ownership. Then comes the Statute. It contemplates, in terms, a use, confidence or trust which is an estate in the land, for the cestui shall "stand and be seised in lawful seisin, estate and possession of and in the same lands, tenements and hereditaments, of and in such like estates as they had or shall have in use, trust or confidence of or in the same." Again, if we may believe Bacon, the clumsy frame of sections I and II, providing in parallel clauses for the cases of seisin of one or more to the use of "others", and that of the seisin of several to the use of "any of them", was dictated by the necessity of avoiding the third parallel case of the conjoined use. Bacon, Law Tracts, 2d ed., 336. The Statute, then, contemplated the common passive use, confidence or trust,

and not the special active use, confidence or trust. Brooke's Note, then, should be read thus: "If he says that the feoffees shall take the profits and deliver them to J. N., this does not make a use in J. N." (meaning a use executed by the Statute, for that is undoubtedly what Brooke was talking about), because J. N. had not the common use, with the right of possession, but a mere right to an accounting, "for he never has them [the profits] unless by the hands of the feoffees". And we may believe that Brooke, if he had been pressed, would have said, as Spence said at a later day, (I Spence, Eq. Jur., 466), that the common use was in the feoffees, since it was not in J. N. and did not result to the feoffer, and since they were to have possession and take the profits in the first instance. He would not have felt that there was repugnancy here, as in Tyrrel's Case, for the common use in the feoffees was a different thing from the special use declared to J. N.

The attempt here is merely to explain the genesis of the doctrine of the active trust in the case of the direction to collect and pay over the profits. Undoubtedly, at a later time, with the advent of the purpose theory, and aided by the lapse of many of the interests which were infringed by the use, the doctrine comes to have a scope which cannot be explained in the foregoing manner.

If these conjectures be correct, then the story of the development of equitable interests from merely personal rights to property rights must be told in two chapters, first of the passive use which in the fullness of its development was struck down, as an equitable institution, by the Statute, and second of the active use which, by reason of its immaturity, was saved from the Statute and pursued its more gradual growth. When the passive use was re-established, under the name of trust, the conditions which had favored the "reifying" of the passive trust in the earlier period had so far disappeared that it partook of the nature of the active trust. E. N. D.

FULL FAITH AND CREDIT AND JURISDICTION.—The judgment of a sister state, when assailed by collateral attack, is often said to occupy a position intermediate between foreign and domestic judgments. Though the older American cases were inclined to examine into the merits of any foreign judgment, the present tendency is toward the adoption of the English view according to which a foreign judgment may be attacked collaterally only for want of jurisdiction or fraud. Dicey, Conflict of Laws (ed. 2) Ch. XVII; see note to *Tremblay* v. *Aetna Life Insurance Co.*, 97 Me. 547, in 94 Am. St. Rep. 521, 538. But whereas any statement of jurisdictional facts in a foreign judgment is presumptive only, a domestic judgment is free from collateral attack on the ground of jurisdiction, except where lack of jurisdiction appears upon the face of the record. 1 BLACK, JUDGMENTS (ed. 2), § 274. The courts of New York have declined to accord this favoured position to domestic judgments and apparently make no distinction between domestic judgments and those of a sister state in this matter. *Ferguson* v. *Crawford*, 70 N. Y. 253, 26 Am. Rep. 589. In view of the so-called 'full faith and credit clause' of the constitution (Art. IV, §1), it is difficult to see why the judg-